Michigan Law Review

Volume 20 | Issue 4

1922

Recent Important Decisions

Michigan Law Review

RECENT IMPORTANT DECISIONS

ADVERSE POSSESSION—WHAT ACTS OF STRANGERS CONSTITUTE AN INTERRUPTION.—Claimant by adverse possession showed that he had fenced in the land in controversy, and had used it for pasturing cattle during a period sufficient to satisfy the Statute of Limitations. Defendant offered evidence to show that strangers had trapped upon this land during the greater part of this period, and that one party in particular had repeatedly set traps there over protests of the adverse claimant, and that no action had been successfully prosecuted against him,—although adverse claimant had threatened to prosecute. It did not appear whether the trespasses were repeated after this time. *Held,* that adverse possession had been made out, and that the acts of strangers referred to did not constitute an interruption. *Bloodsworth* v. *Murray,* (Md., 1921), 114 Atl. 575.

The general rule as given by CYC. is: "The intrusion of a trespasser will in no case interrupt the continuity of an adverse possession, unless continued for such a length of time that knowledge of the intrusion is presumed, or so (continued) as to become the assertion of an adverse right. If they (the intrusions) are known they become assertions of right and operate to break the continuity, unless legal remedies are resorted to within a reasonable time to regain possession, and are prosecuted to a successful determination." 1 CYC. 1011, 2 CORPUS JURIS 98. This statement may be found repeated in effect in not a few cases. *Beard* v. *Ryan,* 78 Ala. 37; *Woodstock Iron Co.* v. *Roberts,* 87 Ala. 436. The basis of such a rule would seem to be the doctrine that the holding must be hostile to the world, and not merely to the legal owner. But with few exceptions, the cases in which this statement of the rule is found are either cases where there have been only isolated trespasses and so no interruption in any event, or else cases where legal remedies had successfully been resorted to. *Love* v. *Turner,* 78 S. C. 513, 519; *Sparks* v. *Bodensick,* 72 Kan. 5, 8. On the other hand, in the later cases where the question has been squarely presented by evidence of continued trespasses or repeated intrusions, the courts have almost always held that the acts in question did not constitute an interruption; and in not a few cases have indicated that the acts of a stranger must amount to an actual disseisin of the adverse occupant to have such an effect. *Inhabitants of Cohasset* v. *Moors,* 204 Mass. 173, 178; *Batchelder* v. *Robbins,* 95 Mo. 59; *Glover* v. *Pfeuffer,* (Tex. Civ. App., 1914) 163 S. W. 984. The rule which the latter cases seem to favor is more consonant with the modern theory that the holding need not be hostile to the world, but merely to the title holder. See TIFFANY ON REAL PROPERTY, § 503.

AGENCY—LIABILITY OF THIRD PERSON TO UNDISCLOSED PRINCIPAL ON SEALED CONTRACT.—In an action for specific performance of a contract to make a lease the complaint stated that the agent who signed the contract

in his own name was known by defendant to have been acting as agent for plaintiff. Demurrer sustained by lower court. Held complaint should have been sustained as stating a cause of action. *Lagumis* v. *Gerard* (1921) 190 N. Y. S. 207.

Will the court of appeals sustain this revolutionary, but very sensible, decision of the supreme court? Judge Cropsey, on the strength of *Harris* v. *Shorall,* 230 N. Y. 343 (1921), thinks it will. Pound, J. there said: "When so much of the old value and high nature of the seal has been lost, the court should not be tenacious to preserve one of its minor incidents for the sake of the rule, but should rather strive to give to the real agreement of the parties." He notes, however, that there may be some reluctance to vary an established rule, and is perhaps relieved that the instant case can be decided on other grounds, leaving this point for final decision when a case is presented compelling a decision. *Lagumis* v. *Gerard* is not the only New York case allowing an action by an undisclosed principal on a contract under seal, but on which a seal was unnecessary. See *e. g. Campbell* v. *Poland Spring Co.,* 187 N. Y. S. 643 (1921). But the court of appeals as late as *Case* v. *Case,* 203 N. Y. 263 (1911) held that "nothing is more definitely settled in our law than that an instrument under seal cannot be enforced by or against one who is not a party to it. This is so elementary as to be axiomatic." This case has been cited at least nine times by New York inferior courts, though often to make distinctions taking the case out of the rule. See *Staff* v. *Bemis Realty Co.,* 183 N. Y. S. 886; *O'Grady* v. *Howe Company,* 152 N. Y. S. 79; *Lockwood* v. *Smith,* 143 N. Y. S. 480.

The instant case, however, is the first in New York to take the rule as to sealed instruments by the collar and pitch it out of court as "an arbitrary, unreasonable rule, which never accomplishes any good, and is used only to prevent the administration of justice." In some other jurisdictions courts have accomplished as much without saying so with such brutal frankness. *Woolsey* v. *Henke,* 125 Wis. 134.

APPEAL AND ERROR—COMPETENT EVIDENCE EXCLUDED—ERROR PRESUMED PREJUDICIAL.—The appellant in a civil suit assigned as error the exclusion of competent, material evidence offered by him. *Held,* case must be reversed, for error is presumed prejudicial unless from the record it appears that the error has worked no prejudice to the objecting party. *Borough* v. *Minneapolis & St. L. Ry. Co.,* (Ia. 1921) 184 N. W. 320.

To secure a reversal in the early common law because of error in the exclusion of competent evidence, the appellant had to show that its admission would probably have resulted in a judgment in his favor. *Tyrwhitt* v. *Wynne,* (1819) 2 Barn. & Ald. 554, and where incompetent evidence was admitted, the court refused a new trial when there was sufficient evidence, without that erroneously admitted, to warrant the finding of the jury. *Doe* v. *Tyler,* (1830) 6 Bing. 561, but the court rejected these salutary rules in *Crease* v. *Barrett,* (1835) 1 Crompton M. & R. 918, because of a fear that the courts would assume the duties of the jury and that a careless treatment

of the rules of evidence would result. According to Mr. Wigmore this case "announced a rule which in spirit and later interpretation signified that an error of ruling created *per se* for the excepting and defeated party a right to a new trial." 1 WIGMORE ON EVIDENCE § 21. This rule was changed in England by the Judicature Act, 1875, Rules of Court, Order 39, rule 3, which provides: "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; * * *" The courts in the United States quite universally followed the regrettable heresy that error in a ruling on evidence is presumed prejudicial. *Ellis* v. *Short,* 21 Pick. (Mass.) 142; *Bolton* v. *Cuthbert,* 132 Ala. 403; *Callaway & Truitt* v. *Gay,* 143 Ala. 524; *St. Louis, I. M. & S. Ry. Co.* v. *Steed,* 105 Ark. 205. And some courts with common law tenacity still cling to the rule notwithstanding statutes requiring them to disregard all errors not affecting the substantial rights of the adverse party. See *Hatch* v. *Bayless,* 164 Mo. App. 216; *Reed* v. *Reed,* 101 Mo. App. 176; and Missouri, R. S. 1899, Sect. 865. Also, *Indiana Union Traction Co.* v. *Hiatt, Admr.,* 65 Ind. App. 233; and Indiana, R. S. 1881, Sect. 1891. The same is true of the principal case. See Iowa, Compiled Code, 1919, Sect. 7244. Some statutes, with more specific provisions, seem to insure against such practice, e. g. Michigan, Compiled Laws 1915, § 13763 provides: "No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court in any civil case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." The rule in this form is approved and recommended for both civil and criminal cases by the American Bar Association. Reports of American Bar Association, 1908, p. 542. The federal courts also held that error on a ruling was presumed prejudicial. *National Biscuit Co.* v. *Nolan,* 138 Fed. 6; *Inman Bros.* v. *Dudley & Daniels Lumber Co.,* 146 Fed. 449. But in *Press Pub. Co.* v. *Monteith,* 180 Fed. 356, the court said, "The defendant * * * invokes the *archaic* rule that if error be discovered, no matter how trivial, prejudice must be presumed. The more rational and enlightened view is that in order to justify a reversal the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights. Prejudice must be perceived, not presumed or imagined." *Accord: Miller* v. *Continental Shipbuilding Corporation,* 265 Fed. 158, where incompetent evidence was admitted. Under the compulsion of statutes, many state courts have adopted this sensible rule. *Byers* v. *Territory,* 1 Okla. Crim. Rep. 698; *Cox* v. *Chase,* 99 Kan. 740; *Koepp* v. *National Enameling and Stamping Co.,* 151 Wis. 302. It has been incorporated into the court rules by some courts. Alabama, Supreme Court Rules, Rule 45, 175 Ala. xxi; Mississippi, Supreme Court Rules, Rule 11, 101 Miss. 906. For an interesting case, see *Jones* v. *State,* 104 Miss. 871, and note, L. R. A. 1918 B 388.

BREACH OF PROMISE TO MARRY—ILLNESS AND DISEASE AS A DEFENSE.—After P and D had been engaged to be married for a number of years D refused to marry P and she brought an action against him for breach of promise. D claimed that since the engagement P had become afflicted with a goitre and that physical and mental illness unfitted her for the marital relation. The trial court charged that P's illness, to constitute a defense, must be permanent and incurable. The appellate court *held* this error, that where disease or physical disability, rendering it unsafe or improper to marry, has developed in either party subsequent to the making of the contract, the other party will be required to wait a reasonable time for a cure to be effected and, if the disease proves to be of a permanent character, may refuse to carry out the contract. *Fellers* v. *Howe,* (Neb., 1921), 184 N. W. 122.

There are but few reported cases in which the ill health of the plaintiff has been urged by the defendant as a defense. In a case in which the plaintiff had become afflicted with a floating kidney rendering her nervous and physically weakened, it was held that if the defendant waited a reasonable time for the plaintiff to recover, and she did not, he was justified in breaking the engagement. *Travis* v. *Schnebly,* 68 Wash. 1. In that case the court said, "A man who has only agreed to marry a healthy woman should not be compelled to accept her as his wife should she become an invalid before marriage." But if the defendant knew of the plaintiff's ill health at the time the promise was made it is no defense. *Lemke* v. *Franzenburg,* 159 Iowa 466. Where the plaintiff has a disease of a character which makes her marriage to the defendant contrary to public policy or eugenics it is clearly a valid defense. *Kantzler* v. *Grant,* (syphilis), 2 Ill. App. 236; *Goddard* v. *Westcott,* (cancer), 82 Mich. 180; *Jefferson* v. *Paskell,* (tuberculosis), [1916] 1 K. B. 57. In such cases it has been held a defense even if the defendant knew of it at the time the contract was made. *Grover* v. *Zook,* (tuberculosis), 44 Wash. 489. Where the plaintiff has a physical impediment to marriage it has likewise been held a defense. *Gring* v. *Lerch,* 112 Pa. St. 244; *Edmonds* v. *Hughes,* 115 Ky. 561. As indicated in the principal case it is not necessary that the ailment of the plaintiff be incurable. *Gring* v. *Lerch, supra; Travis* v. *Schnebly, supra.* While it was not decided in the principal case, the court intimates that it would have considered the plaintiff's affliction and illness a bar to her action had it been established by the evidence. Such a holding would obviously go farther than the case in which the plaintiff's marriage would be contrary to eugenics, or where there exists a physical impediment. However, it finds support in *Travis* v. *Schnebly, supra,* and seems right on principle unless, of course, carried too far. The weight of authority holds that if the defendant, without fault on his part, has become afflicted after the making of the contract with a disease which renders his marriage contrary to public policy, it is a good defense to a suit for breach of promise. *Trammell* v. *Vaughan,* 158 Mo. 214; *Gardner* v. *Arnett,* 21 Ky. L. Rep. 1; *In re Oldfield's Estate,* 175 Iowa 118. See also 14 MICH. L. REV. 666.

CARRIERS—TELEGRAPH—LIMITATION OF LIABILITY ACCORDING TO FILED TARIFF RATES WHERE SENDER DID NOT ASSENT TO OR KNOW OF SUCH LIMITATION.—The respondent had sent a cablegram, the message being unrepeated, and as a result of appellant's negligent error in transmission suffered a loss of $31,000. The appellant had filed tariff rates with the Interstate Commerce Commission limiting their liability for an error in an unrepeated message to the portion of the tolls which it received for the transmission of the message. The appellee did not use a blank containing this stipulation, and neither assented to nor knew of the limited liability. *Held* that appellee was bound by the stipulation. *Western Union Telegraph Co.* v. *Esteve Bros. & Co.* (U. S., 1921), 41 Sup. Ct. 584.

Even after the act of 1910 placed telegraph and telephone companies under the jurisdiction of the Interstate Commerce Commission, the state courts refused to uphold stipulations limiting liability for negligence, in the absence of a supreme court decision on the matter. 18 MICH. L. REV. 248. The principal case is the first supreme court decision to affirm directly and positively the validity of such stipulations for limited liability, although there have been previous intimations that this stand would be taken in accordance with the decisions involving other carriers. 18 MICH. L. REV. 418. It has been held that a message sent between two points in the same state and passing through a third state is an interstate message. *Klippel* v. *Western Union Telegraph Co.*, 106 Kan. 6; 18 MICH. L. REV. 559. It is held that the limitation of liability is binding upon the addressee as well as the sender. *Klotz* v. *Western Union Telegraph Co.*, 187 Iowa 1355. The federal court held that in the case of an intrastate telegram it was not bound by the decisions in the state courts of Ohio, and in the absence of a statute in the state prohibiting such stipulations, the limitation of liability for unrepeated messages was binding. *Friedlander* v. *Postal-Telegraph Cable Co.*, 271 Fed. 954. It is held, however, that stipulations limiting recovery to the cost of an unrepeated message do not excuse the carrier from liability for full damages, when the damages resulted from a total failure to transmit the message, as distinguished from an error in the course of transmission. *Czizek* v. *Western Union Telegraph Co.* (1921), 272 Fed. 223. The principal case also applies to telegraph companies the holding in *Boston & Me. R. Co.* v. *Hooker*, 233 U. S. 97, i. e. that the stipulation limiting liability is binding regardless of the absence of assent or notice, because of the desirability of upholding uniform rates which are presumed to be reasonable from their having been filed with the Interstate Commerce Commission. But in the principal case the court points out that telegraph companies are not required to file their rates. Accordingly a later case, upon the authority of *Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, *supra*, goes still further, holding that the stipulation is valid and binding even though the rates were not filed with the commission, and as in the principal case that assent to the stipulation was not necessary, the message being phoned to the telegraph company, and the sender having no knowledge of any limitation of liability. *Grand Rapids Showcase Co.* v. *Postal-Telegraph Cable Co.*

(Mich. 1921), 183 N. W. 731. The force of filed rates is seen by the holding that the consignee was liable to pay the full amount of freight according to the filed rates, although it had previously paid all the charges asked by the carrier. *N. Y. Central & Hudson River R. Co.* v. *York & Whitney Co.*, 41 Sup. Ct. 509, and also by the holding that the carrier could recover freight from the consignor, when it had agreed to recover it from third parties who could not meet the full claim. *Chicago & E. R. Co.* v. *Lightfoot et al.* (Mo. 1921), 232 S. W. 176. The principal case is in accord with the previous views of the supreme court as to the right of other carriers to limit their liability, and to enforce their stipulations regardless of assent or dissent, although it is subject to what appear to be the reasonbale and sound objections of Justice Pitney in his dissent to *Boston & Maine R. Co.* v. *Hooker, supra.*

CHILD—MEANING OF IN STATUTE ALLOWING ACTION FOR DEATH.—A statute gave to the wife, husband, parent or child of the deceased a right of action for death by wrongful act. Another statute allowed illegitimate children and their issue to inherit from their mother and from each other. Plaintiff was the mother of an illegitimate child killed through the negligence of defendant. *Held,* plaintiff had no cause of action. *State for use of Smith* v. *Hagerstown & F. Ry. Co.*, (Md., 1921) 114 Atl. 729.

In another very recent case, *Panama Ry. Co.* v. *Castilla*, 272 Fed. 656, the court held that as there was no statute in the Canal Zone making a bastard child legitimate as to its mother, she could not recover for her child's death by wrongful act of defendant. Undoubtedly the majority of decided cases in point in this country and England are in accord with the instant case, but it is submitted that they are based upon an unwise policy and an unfortunate following of bad precedent. For authorities and more extended discussion, see 19 MICH. L. REV. 562.

CONSTITUTIONAL LAW—FEDERAL TAX LAW EFFECTING REGULATION OF CHILD LABOR UNCONSTITUTIONAL.—Plaintiff sought an injunction to restrain collection of a tax levied pursuant to the Act of Feb. 24, 1919, § 1200 (Comp. St. Ann. Supp. 1919, 6336 7/8a), which imposed a 10 per cent. excise tax on net profits of certain employers of child labor. Tax law *held* unconstitutional as an attempt on the part of Congress, not to collect revenue, but to control the internal affairs of a state. Injunction granted. *George* v. *Bailey* (1921, W. D. N. C.), 274 Fed. 639.

The court, in the principal case, considered itself bound by *Hammer* v. *Dagenhart*, 247 U. S. 251, where the Supreme Court, in a 5 to 4 decision, declared the Owen Keating Act unconstitutional. Purporting to exercise its authority under the commerce clause of the Constitution, Congress had provided, in that Act, that the products of child labor should not be shipped in interstate or foreign commerce. Though ostensibly an exercise of power to regulate commerce, the Act was held to be an unlawful attempt by Congress to enact a police measure regulating child labor within the states.

Although an unlawful interference with power reserved to the states when done directly, can this be done indirectly? The first important case directly in point, *McCray* v. *U. S.*, 195 U. S. 27, answers affirmatively. There the Act of Congress, apparently an exercise of taxing power, imposed a tax of 10 cents per pound upon colored oleomargarine. The legislators knew that instead of raising revenue, the Act would prohibit the manufacture of colored oleomargarine. But the Act was upheld, the court disclaiming any right to say that Congress has abused a delegated power merely because the effect of exercising it is to encroach upon a field wherein the state has the power to legislate. The statement by Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 316, that "* * * the power to tax involves the power to destroy," was referred to in the *McCray* case. Earlier cases tended to support the doctrine of *McCray* v. *U. S.* See, *In re Kollock*, 165 U. S. 526 (requirement that packages be marked to prevent fraud, considered merely incidental to revenue purpose of the Act); *Veazie Bank* v. *Fenno*, 75 U. S. (8 Wall.) 533 (*semble.* Tax of 8% per annum on the circulation of notes of state banks, clearly intended to drive them out of circulation. Act ultimately sustained under power of Congress to regulate coinage); *Champion* v. *Ames*, 188 U. S. 321 (Lottery Ticket Law, upheld as exercise of power over commerce); *U. S.* v. *288 Packages of Merry World Tobacco*, 103 Fed. 453 (Tobacco Tax Law, with provision that packages could contain nothing but tobacco). In 17 MICH. L. REV. 83 there is a clear analysis of the real situation where powers delegated to Congress and those reserved to the states apparently conflict. In the interim between *McCray* v. *U. S.* and *Hammer* v. *Dagenhart*, the formidable array of cases supporting the former would appear to leave the *Dagenhart* case almost inexplicable. *U. S.* v. *Jin Fuey Moy*, 241 U. S. 394 (Statute had moral end, upheld as revenue measure); *Steinfeldt* v. *U. S.*, 219 Fed. 879 (Narcotic Act having moral end, sustained under commerce clause); *U. S.* v. *Brown*, 224 Fed. 135 (Narcotic Act, valid under commerce or tax clause); *Lee Mow Lin* v. *U. S.*, 250 Fed. 694 ($300 per pound tax on manufacture of opium valid); *Hipolite Egg Co.* v. *U. S.*, 220 U. S. 45 (Pure Food Law, valid under commerce clause); *Clark Distilling Co.* v. *Western Md. Ry.*, 242 U. S. 311 (Liquor regulation, valid under commerce clause); *Caminetti* v. *U. S.*, 242 U. S. 470 (White Slave Act, valid under commerce clause); *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (*Semble*, tax on corporations created by state). Since the *Dagenhart* case a Narcotic Act has been upheld as an exercise of taxing power. *U. S.* v. *Rosenberg*, 251 Fed. 963. Cases opposing the doctrine of *McCray* v. *U. S.* are few. *Craig* v. *Dimock*, 47 Ill. 308 (*semble*); *U. S.* v. *Doremus*, 246 Fed. 958 (Narcotic Act). For an analytical consideration of the problem raised in *McCray* v. *U. S.*, see 6 MICH. L. REV. 277. Even though it be conceded that the powers granted to Congress in the Constitution did not originally admit of such exercise as was allowed in *McCray* v. *U. S.* and the supporters of its doctrine, may we not justify those decisions and the wisdom of following them by placing upon the pertinent Constitutional provisions a sociological interpretation? See 16 MICH. L. REV. 599.

CONTRACTS—IMPOSSIBILITY—TEACHER'S CLAIM TO SALARY FOR TIME DURING WHICH SCHOOL WAS CLOSED BY HEALTH BOARD.—Plaintiff sued township trustees under a contract for employment as school teacher, to recover salary for twenty-seven days during which the school had been closed by the county board of health, acting under authority granted by statute. Defense of township trustees was based upon impossibility of performance as an excuse. *Held,* that the defense was good. *Gregg School Tp., Morgan Co.* v. *Hinshaw,* (Ind., 1921) 132 N. E. 586.

Cases similar to the principal case have not been infrequent in recent years. See 18 MICH. L. REV. 796. In the principal case, as in these cases generally, the decision is put upon the ground that performance was impossible, and therefore excused. The court states as the rule that "when performance becomes impossible, non-performance is excused, and no damages can be recovered." It is submitted, however, that performance by the trustees of the promise sued upon, viz., the promise to pay salary, was not impossible, (nor prevented by law); and furthermore, that impossibility does not necessarily excuse in every case. The real basis for the defendant's defense would seem to have been failure by plaintiff to perform the services which were the condition precedent to his right to recover the salary. *Amer. Mercantile Exch.* v. *Blunt,* 102 Me. 128. See WILLISTON ON CONTRACTS, secs. 838, 1972 and 1973. On this theory the plaintiff could recover only by showing that he was excused from performing this condition. The only valid excuse, in a case like the principal case, where the condition is at the same time the consideration for the defendant's promise, is that the promisor has waived, or prevented the performance of, or materially increased the difficulty of performing such condition precedent. *Melville* v. *DeWolf,* 4 E. & B. 844; *New York Life Ins. Co.* v. *Statham,* 93 U. S. 24. But see *Schoelkopf* v. *Moerbach Brewing Co.,* 184 N. Y. Supp. 267. The second criticism, which pertains to the court's statement of the rule in regard to impossibility, raises the much mooted question as to just how far impossibility excuses. That the rule as here given is too broad would seem to be evident from even a superficial examination of the authorities. *Columbus Ry., Power & Light Co.* v. *City of Columbus,* 249 U. S. 399; *Mascall* v. *Reitmeier,* 145 Minn. 214. To accept the language of the court as an exact statement of the rule would involve an unwarranted extension of the limits of impossibility as a defense. See 17 MICH. L. REV. 412 and 689; 18 MICH. L. REV. 589, and L. R. A. 1916 F 10. It is probable that the court did not intend the rule as given to be taken without qualifications and exceptions. If so, we can only say that such broad, unguarded statements are to be deprecated as misleading, especially where there is no indication in the language used that the court is speaking in general terms.

CRIMES—INDICTMENT—ALLEGATION OF IMPLIED ELEMENT IN STATUTORY CRIME.—A statute required the driver of an automobile striking a person to stop, render assistance, and give certain information on request, and it provided a penalty for failure to do so. The defendant was charged with doing acts as set out in the statute, the indictment failing to allege that he

knew he had struck anyone when he failed to stop. *Held,* though lack of knowledge on the part of the defendant would be a defense, the indictment was sufficient because the word "knowingly" did not appear in the statute in the description of the act denounced as the offense. *Scott* v. *State* (Tex. Cr. App., 1921) 233 S. W. 1097.

Where a statute states the elements of a crime it is generally correct to describe the crime in the words of the statute. *State* v. *Blackington,* 111 Me. 229. But "where the words of the statute by their generality may embrace acts which fall within the terms but not within the spirit or meaning of the statute the specific facts must be alleged to bring the defendant precisely within the inhibition of the law." *State* v. *Doran,* 99 Me. 329. "While as a general rule it is sufficient to charge a statutory offense in the words of the statute, the information must contain a statement of the acts constituting the offense and if the statutory words are not sufficient it must be expanded beyond them." *Wilcox* v. *State,* 13 Okla. Crim. 599. These rulings are but illustrations of the general rule that the indictment must charge a crime and so must state specifically all the facts and circumstances necessary to constitute the offense charged. *Brown* v. *Williams,* 31 Me. 403. The principal case squarely raises the question of whether or not the indictment need allege an element construed into the statute by the court in order to give effect to the legislative intent. When a statute specifically requires that an act be done knowingly, knowledge must be averred to charge the crime. *Bailey* v. *Commonwealth,* 78 Va. 19; *Powers* v. *State,* 87 Ind. 97. *James and Mollie Robeson* v. *State,* 50 Tenn. 266, *contra,* on the ground that knowledge is not an element of the offense but lack of knowledge is a matter of defense. If knowledge must be alleged when it is mentioned in the enactment there is no reason why it should not be alleged when the court reads it into the act. This application of the cardinal rule of criminal pleading, that the indictment must charge a crime, is sustained by numerous authorities which hold that the indictment must set forth specifically even elements of the offense that are implied by the statute as well as those that are specified. *Commonwealth* v. *Stout,* 7 B. Mon. (Ky.) 247; *United States* v. *Carll,* 105 U. S. 611; *Birney* v. *State,* 8 Ohio 230; *State* v. *Downer,* 8 Vt. 424; *Harrington* v. *State,* 54 Miss. 490; *Wilcox* v. *State, supra.* Among the cases *contra* are *Pierce* v. *State,* 10 Texas 556; and *Halsted* v. *State,* 41 N. J. Law 552.

CRIMINAL LAW—JURISDICTION—DEFENDANT ILLEGALLY BROUGHT INTO JURISDICTION.—Petitioner while serving a sentence in the United States penitentiary at Atlanta, Ga., was taken by the warden, on a telegram from the Attorney General and without the institution of proceedings for his removal under REV. ST. 1014 (COMP. ST. 1674), into the southern district of New York, and on his arrival there was brought into court on a writ of *habeas corpus ad prosequendem,* and was convicted for another offense. *Held,* that, while he was brought into the district of trial illegally, such fact did not affect the jurisdiction of the court to try him nor invalidate the judgment. *Ex parte Lamar,* 274 Fed. 160.

In civil cases "the law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim." *In re Johnson,* 167 U. S. 120. But a different rule has always obtained in criminal cases. In one of the earlier cases, *Ex parte Susannah Scott,* 9 B. & C. 446, the question of the prisoner's right to be released because she was illegally arrested in Belgium and brought to England was argued before Lord Tenterden. He held that where a party charged with a crime is found in the country, it was the duty of the court to take care that he should be amenable to justice and it could not consider the circumstances under which he was brought there. In the United States the decisions uniformly hold that, in criminal cases, the jurisdiction of the court in which the offense charged was committed is not impaired by the manner in which the accused was brought before it. 15 L. R. A. 177, *note.* So that "if a person is brought within the jurisdiction of one state from another or from a foreign country, by the unlawful use of force, which would render the officer liable to a civil action, or in a criminal proceeding because of this forcible abduction, such fact would not prevent the trial of the person thus abducted in the state where he had committed that offense." *Adams* v. *New York,* 192 U. S. 585, 596. The same doctrine was declared in *State* v. *Ross,* 21 Iowa 467, where the court noting the distinction between civil and criminal cases said: "In the one (civil) the party invoking the aid of the court is guilty of fraud or violence in bringing the defendant or his property within the jurisdiction of the court. In the other (criminal) the people, the State is guilty of no wrong." The concurrence of opinion has seemed to proceed on the ground that the offender against the law of the state is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another state. The question has had an interesting history in the federal courts where relief has been sought by persons forcibly removed from one jurisdiction to another. In *Ker* v. *Illinois,* 119 U. S. 436, and *Mahon* v. *Justice,* 127 U. S. 700, it was adjudged that in such a case neither the Constitution, nor the laws of the United States entitled the person so held to be discharged from custody and allowed to depart from the jurisdiction. In *Lascelles* v. *Georgia,* 148 U. S. 537, the same principle was announced where a fugitive from justice, surrendered upon a requisition charging him with the commission of a specific crime, had been tried for a different crime by the state to which he had been returned. In *Pettibone* v. *Nichols,* 203 U. S. 192, Justice McKenna dissenting, counsel attempted to distinguish this case on the ground suggested in *State* v. *Ross, supra,* and contended that the states through their officers were the offenders in effecting the abduction, but the court held that it could not properly inquire into the methods by which the state obtained custody of the defendant. Mr. Justice McKenna dissenting said, "the distinction is important to observe," for, as he remarks, "no individual or individuals could have accomplished what the power of two states accomplished." However, as suggested in the principal case the controlling considerations are those of public policy and "the interest of the public overrides that which is, after all, a mere privilege from arrest."

EVIDENCE—OPINION—WHETHER AUTOMOBILE COULD HAVE BEEN STOPPED SOONER.—In a suit against D for running over and killing P's infant son, D was asked by his attorney whether he could have stopped the automobile sooner than he did. Upon objection, the court *held*, that the question was improper since it called for conclusions which should be drawn by the jury from the facts given by the witness. *Taylor* v. *Lewis*, (Ala., 1921), 89 So. 581.

The general rule is that a witness must be confined to a statement of the facts and will not be permitted to testify to opinions, inferences, or conclusions based on the facts. See 3 WIGMORE, EVID., § 1917. When all the facts are before the jury it is superfluous to add, by way of testimony, inferences which the jury can equally well draw for themselves. 3 WIGMORE, EVID., § 1918; 1 GREENLEAF, EVID., § 441 b. The reason is not that it is attempting to usurp the functions of the jury, as the principal case intimates. *Beaubien* v. *Cicotte*, 12 Mich. 459. Nor is it because an opinion should not be given on the very issue before the jury. *Snow* v. *Boston and Maine R. Co.*, 65 Me. 230. It is merely because the testimony is superfluous and unnecessary. However, in the principal case it would seem that it would be impossible to place before the jury all the facts upon which the possibility of stopping the automobile depended, and if the inference of a witness would be helpful to them it should be admitted. 3 WIGMORE, EVID., § 1921. Witnesses of ordinary ability may testify as to the speed of automobiles. *Denver, O. & C. Co.* v. *Krebs*, 255 Fed. 543; *Creedon* v. *Galvin*, 226 Mass. 140; 3 CHAMBERLAYNE, EVID., § 2086. But a witness must be shown to be especially fitted by experience in operation to testify as to the distance in which one may be stopped. *Goldblatt* v. *Brocklebank*, 166 Ill. App. 315; *Hamilton, H. & Co.* v. *Larrimer*, 183 Ind. 429; BERRY, AUTOMOBILES, 1012. Had the defendant been shown thus qualified it would seem that his opinion should have been admitted. *Scholl* v. *Grayson*, 147 Mo. App. 652; *Crandall* v. *Krause*, 165 Ill. App. 15.

EVIDENCE—WITNESSES—COURT CANNOT REQUIRE PROSECUTRIX IN RAPE CASE TO SUBJECT HERSELF TO EXAMINATION BY PHYSICIAN.—Prosecutrix in a rape case denied that she had previous intercourse with accused, and asserted she had never had intercourse with any man. Accused then requested that court order the prosecutrix to undergo a physical examination, asserting that if the examination revealed the fact that she was not virtuous it would support the theory that she had been indulging in sexual intercourse with defendant, and tend to discredit her testimony as to the alleged assault. *Held*, there is no rule of law that would authorize the trial judge to require a witness to subject herself to such an examination, or any right to enforce such an order if made. *Rettig* v. *State* (Tex. 1921), 233 S. W. 839.

Whether or not the courts have inherent power to compel parties to submit their persons to physical examination is in conflict. In *Union Pac. Ry. Co.* v. *Botsford*, 141 U. S. 250, which was a civil action for injury to the person, the court refused to give such an order on the ground that the power to compel a physical examination was "never known to the common law,

except in a very small number of cases based upon special reasons and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." The majority of courts, however, in civil actions for injuries to the person, assert that the court does have the power to compel the plaintiff to undergo a physical examination. *Schroeder* v. *C. R. I. & P. Ry. Co.*, 47 Ia. 375; 3 WIGMORE ON EV., § 2220. This power has also been exercised by the courts when the marriage relation has been sought to be annulled on the ground of impotency or incapacity to perform the marital act. See note to *Cleveland Ry. Co.* v. *Huddleston*, 68 A. S. R. 251. The courts, however, have been very reluctant to exercise this power in rape or cognate offenses where the prosecutrix has nothing to gain. In *McGuff* v. *State*, 88 Ala. 147, the court said: "It may well be doubted in rape cases whether the court has power to make an order compelling the inspection of the private person of a prosecutrix, in the event of her refusal to submit to such examination. If such right exists at all, we should hold it to be a matter of judicial discretion, to be exercised only in cases of extreme necessity, and not a subject of review on appeal to this court." The court has also refused to grant such an order on the ground of public policy because "modest women would oftentimes doubtless prefer to bear with the wrong visited upon them than to expose themselves to the humiliation of a physical examination." *Thomas* v. *Commonwealth*, 188 Ky. 509. And in prosecutions for slander the court has refused to order the prosecutrix to submit to a physical examination. *Kern* v. *Bridwell*, 119 Ind. 226. One reason why the courts more readily order a physical examination in civil cases than in criminal actions is that the court may easily enforce its order in such cases by declaring a non-suit should the order be disobeyed. Whether the court is without authority to grant such an order, as is held by the principal case, may well be doubted; it is certain that the courts have hesitated to exercise such a power.

HUSBAND AND WIFE—HUSBAND'S LIABILITY TO MERCHANT FOR NON-NECESSARIES PURCHASED BY DESERTING WIFE.—Appellant and wife had been married three years. During that time the wife had made two purchases of clothing which was not necessary upon the credit of the appellant and he had paid the bills. On the day that the wife deserted the appellant she purchased on his credit non-necessary clothing to the value of $175. She started divorce proceedings three days later, and the appellant then notified the appellee that he would no longer be responsible for debts contracted by his wife. *Held*, appellant was liable for the value of the goods purchased. *Martz* v. *Selig Dry Goods Co.* (Ind. App. 1921), 131 N. E. 528.

It is well settled that the husband is liable for necessaries purchased by his wife. As to what may constitute necessaries, see 13 MICH. L. REV. 262. The liability continues after a separation due to the fault of the husband, *Wisnom* v. *McCarthy*, (Cal.), 192 Pac. 337, but not unless the plaintiff has shown that the separation was due to the husband's misconduct. *Vusler* v. *Cox*, 53 N. J. Law 516. However, to establish liability for non-necessaries it must be shown that the wife was the express or implied agent of the hus-

band. The mere marital relationship will not establish the agency. *Baker* v. *Witten,* 1 Okl. 160; *Wanamaker* v. *Weaver,* 176 N. Y. 75. The husband's failure to disaffirm his responsibility for his wife's purchase of hats for his daughter, they being non-necessaries, was held to amount to ratification, and he was liable. *Auringer* v. *Cochrane,* 225 Mass. 273, 15 MICH. L. REV. 521. The wife's authority to act as agent for her husband may be implied from the husband's absence under some circumstances. See SCHOULER, MARRIAGE, DIVORCE, SEPARATION, AND DOMESTIC RELATIONS (Ed. 6), §§ 135-145. The agency may be terminated by notice to the third party. Such notice was imputed, where the wife's father was an officer of the bank where the husband kept his funds. When she checked out these funds after separation from her husband the bank was held liable for the money paid to the wife, although she had been accustomed to check against his account to pay current expenses of his business. *Addison* v. *Dent County Savings Bank of Salem* (Mo. 1920), 226 S. W. 323. Where a wife deserted her husband and went to live with another man, her order of goods on the husband's credit, with delivery at her changed address, was held to give the merchant notice sufficient to terminate the agency. *Swan* v. *Mathieson,* 27 Times L. Rep. 153. The principal case seems sound in holding that the husband's liability continues, even after desertion by the wife, until notice of the fact to the merchant, since the liability is based upon the appearance from previous conduct that the wife was authorized to act generally for her husband.

JURORS—REFUSAL TO EXCLUDE JUROR HAVING AN OPINION AS TO DEFENDANT'S GUILT.—A statute provided that a juror having an opinion not positive in its character, or not based on personal knowledge of the facts, shall not be disqualified provided he swears he can render an impartial verdict according to the evidence, and the court believes he can do so. The question was whether one who had formed an opinion from reading newspaper accounts of a previous trial, but who swore that he could set his opinion aside, and render a verdict according to the evidence, was disqualified. *Held,* by a divided court, that, the opinion being founded on newspaper reports, it would be a reflection upon a man's intelligence and integrity to find that notwithstanding such opinion he would not be able to base his verdict solely upon the evidence, when he swears he can do so, and the court believes him. *People* v. *Garner,* (Mich., 1921), 184 N. W. 577.

The common law rule, as recognized in this country, did not require the disqualification of a juror simply because he had formed an opinion as to the guilt or innocence of the accused, but held him incompetent only in case the opinion was so strong as to prevent him from rendering a verdict according to the evidence. See note to *Smith* v. *Eames,* 36 Am. Dec. 522. The statute involved in the principal case is declaratory of this principle, and the question for the court to decide is whether the character of the opinion is such as to disqualify. Whether an opinion formed from reading newspaper reports is of such a character as would necessarily prevent a juror from deciding a case according to the evidence is in conflict. The majority of cases hold that an opinion based upon such information does

not necessarily disqualify. *State* v. *Baker,* 33 W. Va. 319; *State* v. *Ford,* 37 La. Ann. 443. See note to *Scribner* v. *State,* 35 L. R. A. n. s. 985. The reasoning upon which these cases rest is most aptly put by the West Virginia court in *State* v. *Baker, supra,* saying that to disqualify such a juror "would put a premium upon ignorance, and a discount on reading and intelligence; and the unbending application of such a rule would practically disable the courts from securing juries of adequate capacity to fitly decide grave and momentous causes." On the other hand there are several courts which hold that an opinion based upon newspaper reports of a previous trial does disqualify. *Greenfield* v. *People,* 74 N. Y. 277; *Staup* v. *Commonwealth,* 74 Pa. St. 458; *State* v. *Culler,* 82 Mo. 623. The theory of these cases is that the source of information is such that the juror cannot possibly set aside his opinion, but will unconsciously be swayed by it. As said by the court in *Greenfield* v. *People, supra,* "can that mind be unbiased in the second pondering, of the same testimony, which has already caused it to preponderate and settle it to or towards a conclusion." The force of this argument cannot be denied, but justice would be more intelligently administered by applying the rule laid down in the principal case. On principle a juror should never be disqualified simply because he has an opinion as to the merits of the case. It is only when the opinion is so strong that the juror could not render an opinion according to the evidence, that he should be declared incompetent.

MARRIAGE—FRAUDULENT REPRESENTATION—ANNULMENT.—Defendant induced the plaintiff to marry her by representing to him that her pregnancy was the result of his illicit relations with her, though she then knew that another was the cause of her condition. Plaintiff did nothing to investigate the truth of her representations. *Held,* the fraud was ground for annulment of the marriage. *Jackson* v. *Ruby,* (Me., 1921), 115 Atl. 90.

Ordinarily a wife's pregnancy by another man at the time of her marriage, if unknown to her husband, is ground for annulment of the marriage, *Reynolds* v. *Reynolds,* 3 Allen (Mass.) 605; *Harrison* v. *Harrison,* 94 Mich. 559. *Contra, Moss* v. *Moss,* (Eng.) 77 L. T. N. S. 220; but not where the wife's condition, though unknown to the husband, is a result of his own antenuptial incontinence. *McCulloch* v. *McCulloch,* 69 Tex. 682. The earlier cases quite commonly refused to free a husband who had been guilty of premarital incontinence with his wife, even though the marriage was induced by the representations of the wife that her pregnancy was caused by him, when she knew it was caused by another. In *Scroggins* v. *Scroggins,* 14 N. C. (3 Dev. L.) 535, where the husband and wife were white, and the child born a mulatto, the court refused relief on the theory that public policy required the preservation of the indissolubility of the marriage tie. But see *Barden* v. *Barden,* 14 N. C. (3 Dev. L.) 548 and *Bryant* v. *Bryant,* 171 N. C. 746. Some denied the petition of the husband on the ground that he did not come into court with clean hands. *States* v. *States,* 37 N. J. Eq. 195; *Seilheimer* v. *Seilheimer,* 40 N. J. Eq. 412. But this view has been rejected by other courts on the theory that the gravamen of the complaint is not the

illicit intercourse but the prior pregnancy and concealment concerning which the deceived party is innocent. *Winner* v. *Winner,* 171 Wis. 413; *Lyman* v. *Lyman,* 90 Conn. 399. In *Foss* v. *Foss,* 12 Allen (Mass.) 26, where the parties had sexual intercourse at their second or third meeting and were married a short time later, relief was denied the husband. The court held that his predicament was the result of his own "blind credulity" and that his antenuptial relations with his wife and her condition were sufficient to put a reasonable man on inquiry, necessitating some sort of investigation on his part into the truth of her representations. *Safford* v. *Safford,* 224 Mass. 392. See also, *Franke* v. *Franke,* (Cal.), 31 Pac. 571. In *Winner* v. *Winner, supra,* the court annulled the marriage and though disapproving of the Massachusetts rule above, it distinguished the case on the ground that because of their long comradeship and their engagement, the plaintiff acted reasonably in relying on the representations of the defendant. The more recent cases grant relief to the husband and reject the Massachusetts rule because of a belief that it punishes too severely the wrongdoer who is making a praiseworthy attempt at retribution. *Lyman* v. *Lyman,* (1916) 90 Conn. 399; *Ritayik* v. *Ritayik,* (1919) 202 Mo. App. 74; *Wallace* v. *Wallace,* (1908) 137 Ia. 37, (involving a statute); *Gard* v. *Gard,* (1918) 204 Mich. 255, where the defendant had informed the plaintiff of her intercourse with another. See 18 L. R. A. 375; L. R. A. 1916 E 643, 650; 11 A. L. R. 931.

MUNICIPAL ZONING—EXCLUSION OF GASOLINE FILLING STATION FROM RESIDENTIAL DISTRICT.—A statute authorized cities of the first class to establish restricted residential districts and to provide that no buildings except residences, schoolhouses and churches should be erected within such districts without first securing a permit from the city council, such permit to be issued under such reasonable rules and regulations as the city council might provide. An ordinance of the city of Des Moines created such a district. Defendant sought a permit to erect a gasoline filling station within said district, and when it was refused proceeded to erect it without permission. The city sued to enjoin him. It appeared that the corner where the station was to be erected was an intersection from which five streets radiated, that one corner was occupied by a park which was frequented by small children, and that another corner was occupied by a church. Plaintiff contended that the station would increase congestion of vehicles, would accentuate the noise and confusion of ordinary street traffic to the disturbance of the inhabitants and the church, that the disagreeable odors of gasoline would pervade the neighborhood, that the drip of oil would befoul the streets, and that, in general, the said business would be detrimental to the health, comfort, and general welfare of the people making their homes in the district, and would constitute a nuisance. Defendant denied that its business would constitute a nuisance and contended that the refusal of the permit was unconstitutional. *Held,* the refusal was a valid exercise of police power and defendant was enjoined from erecting his filling station. *City of Des Moines* v. *Manhattan Oil Co.,* (Ia. 1921) 184 N. W. 823.

The question in the case was whether or not the regulations under

which the defendant had been refused the permit were valid. This refusal would be a deprivation of property within the meaning of the Fourteenth amendment unless it could be justified as a valid exercise of the police power of the state. Is the police power of such scope as to warrant such restrictions on property owners in residential districts? That it may be invoked to confine certain occupations to restricted districts when such regulation may be necessary to protect the health, morals, and safety of the public is well settled. *Reinman* v. *City of Little Rock,* 237 U. S. 171. It may be extended to control matters relating to general prosperity not included by health, morals, and safety. *C. B. & Q. Ry.* v. *Drainage Comm'rs,* 200 U. S. 561, 592. In *dicta,* at least, it has been extended to public comfort although it is probable that that term has been used synonymously with "health." *Ex parte Quong Wo,* 161 Cal. 220. But it has been held that the police power will not justify the withholding of a building permit merely because the proposed building is not of as good quality as the others in the neighborhood or because its erection would decrease property values. *Bostock* v. *Sams,* 95 Md. 400. Nor have the aesthetic tastes of the neighborhood been considered sufficient to warrant the restriction of use of property. *City of Passaic* v. *Paterson Bill Posting Co.,* 72 N. J. L. 285. In that case the court said, "Aesthetic considerations are matters of luxury and indulgence rather than of necessity and it is necessity alone which justifies the exercise of the police power."

However, there are indications in recent decisions that aesthetic considerations may at least be weighed in the balance along with other subjects which are admittedly within the scope of the police power, *Welch* v. *Swasey,* 193 Mass. 364, 214 U. S. 91, and it is altogether probable that their weight is increasing as time goes on. Somewhere in the range between public safety and public pleasure there is a dividing line which is apparently shifting down the scale in such a way as to increase the scope of the police power, and the gasoline filling station would seem to come extremely close to this line as it is established today. It has been held that the use of property in residential districts for garage purposes may be prohibited. *People ex rel. Keller* v. *Oak Park,* 266 Ill. 365. On the other hand prohibiting a small store building has been held invalid. *State ex rel. Lachtman* v. *Houghton,* 134 Minn. 226. The Iowa court in the principal case has placed the filling station in the former class. It is impossible to determine from the decision whether it did so because it considered such a station inimical to public health and safety, or because it was expanding the scope of the police power to include the hitherto immaterial considerations of aesthetic tastes and decrease of property values. As to the former possibility, it would seem that noise during church services and odors of gasoline could hardly be called unhealthful, however unpleasant they may be. Nor does the traffic congestion argument seem particularly cogent in justification of it as a public safety measure. The decision may well be regarded as considerable expansion of police power to justify residential zone laws. For a summary of recent cases on the subject see 19 MICH. L. REV. 191.

NUISANCES—TUBERCULOSIS SANATORIUM.—Defendant, a physician, was conducting a tuberculosis sanatorium in a residential district of the city, in close proximity to the homes of the plaintiffs. It was shown that the property value was reduced 25 per cent because of the prevailing fear of tuberculosis. Plaintiffs sought an injunction restraining the defendant from conducting the sanatorium in this residential district. *Held,* that the sanatorium was not a nuisance *per se,* but became such by reason of its location in a residential district, and the court granted the injunction. *Brink* v. *Shepard,* (1921) 215 Mich. 390.

The general rule seems to be that a hospital, whether for treatment of ordinary diseases or for the treatment of contagious and infectious ones, is not a nuisance *per se,* though it may become such by reason of the place of its location or because of the manner in which it is conducted. *Frazer* v. *Chicago,* 186 Ill. 480; *Haag* v. *Vanderburgh Co.,* 60 Ind. 511; *Cherry* v. *Williams,* 147 N. C. 452; *Barry* v. *Smith,* 191 Mass. 78. The establishment of the hospital need not place the occupants of adjacent buildings in actual danger of infection, but if they have a reasonable ground to fear such result and the reasonable enjoyment of their property would be materially interfered with, relief will be granted. *Stotler* v. *Rochelle,* 83 Kan. 86; *Baltimore* v. *Fairfield Imp. Co.,* 87 Md. 352; *Shepard* v. *Seattle,* 59 Wash. 363. As Chadwick, J., stated in the case of *Everett* v. *Paschall,* 61 Wash. 47, "The question is not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real, in that it affects the conduct and movement of men." In a densely populated community a hospital is undoubtedly a nuisance. *Deaconess Home* v. *Bontjes,* 207 Ill. 553; *Kestner* v. *Homeopathic Hospital,* 245 Pa. St. 326; *Cherry* v. *Williams, supra.* Thus, the decision of the court in the principal case seems to be sound and in accord with the general trend of authorities.

PATENT LAW—IDEA OF MEANS A PART OF INVENTION.—Originally bifocal eye lenses were built up by combining two lenses in one frame. The result was always an undesirable prismatic aberration at the division line between the upper and lower fields. There had been early patents of a "single crystal bi-focal," that is a single piece of glass with two fields ground upon it. Such a lens would largely eliminate the aberration. However, great difficulty was encountered in grinding such lenses, and the means of manufacture suggested in the earlier patents had not proved practicable. Plaintiff patented a single crystal bi-focal and suggested a workable means of manufacture. Defendant discovered an entirely different means of making substantially equivalent lenses, and proceeded to manufacture them. Suit for infringement. Defense, anticipation and non-infringement. *Held,* the prior patents did not anticipate the plaintiff's patent; defendant was an infringer. *One Piece Bi-focal Lens Co.* v. *Stead,* (1921) 274 Fed. 667.

In placing a patented article of manufacture on the market, there are two distinct steps involved, first, the conceiving of the possibility of making such a thing, and second, devising a way of making it. In order to decide that the plaintiff's patent was not anticipated, the court must have concluded

that plaintiff's means, or method, of manufacture was a necessary element in his invention. It must have considered the plaintiff's product a totally different article from those embodied in the earlier patents for the reason that it was produced in an entirely different way. There can be no question of the soundness of this conclusion. That the means of production is an integral part of the patented product is supported by those cases which hold that although someone else has previously suggested a useful and desirable commodity, yet the one who actually devised the means of giving physical existence to it is the original inventor. If the idea of the thing itself were the patentable idea then the person who subsequently devised the means of manufacture would have been anticipated, except as to his means. *Pitts* v. *Hall,* 2 Blatch. 229. See also WAITE, PATENT LAW, p. 124-5. Furthermore, it would seem that the subject matter of the patent in the principal case would, if it were not for the suggested means of production, be merely a statement of a desirable result, namely the prevention of the line of aberration by making the entire lens in one piece. That a mere result or function of a device is not patentable is well settled. *Risdon Iron and Locomotive Works* v. *Medart,* 158 U. S. 68. So the holding of the principal case in regard to anticipation is entirely satisfactory. But, as to infringement, it is clearly inconsistent. The defendant had used still a third means of manufacture, and should have been given as much credit for his new product as the plaintiff was given for his. It is true that the defendant's product was substantially the same as the plaintiff's in physical characteristics, but the fact that it was made by an entirely new means gives it novelty in the eyes of patent law. Either plaintiff's patent was for the product, regardless of the means of production,—in which case it was anticipated; or it was for the product as produced by his means—in which case his patent did not cover the defendant's product as produced by different means.

SALES—POSSESSION NOT INDICIA OF TITLE.—P., the owner of an automobile, loaned it to Green and allowed the license to be renewed in Green's name. Green then sold the car to D., an innocent purchaser. In a replevin suit by P., *held,* that possession alone was not indicia of ownership; that, since it was not shown that D. knew that the license was issued in Green's name, there was no evidence that P. "permitted the property to be disposed of to an innocent purchaser under such circumstances as would lead an ordinarily prudent person to believe that the property was rightfully sold," and the court should not have submitted the question of estoppel to the jury. *Forrest* v. *Benson,* (Ark. 1921) 233 S. W. 916.

Chancellor Kent says that it is a maxim alike of the civil and common law that *nemo plus juris in alium transferre potest quam ipse habet.* 2 Kent's Com. 324. But although one cannot give what he does not have, still a buyer may acquire an effective title from a seller who had no title if the original owner is estopped to deny that the seller had title. If the owner of goods *merely* entrusts possession to another, he is not estopped to assert title against an innocent purchaser from the one in possession, for mere possession is not an indicium of ownership upon which the purchaser would

have a right to rely entirely. *Oyler* v. *Renfro,* 86 Mo. App. 321; *Ball Co.* v. *Lane,* 135 Mich. 275. But if the owner gives another not only the possession, but also other indicia of title—an apparent ownership—and if the purchaser knows of this apparent ownership and innocently acts upon it, the doctrine of estoppel *in pais* applies and the original owner cannot deny that the seller had title. *O'Connor* v. *Clark,* 170 Pa. 318; *Nixon* v. *Brown,* 57 N, H. 34. But in the principal case, one of the essential elements necessary to create an estoppel was lacking, for although P. entrusted the seller with possession and allowed him to renew the license in his name, there was no evidence that the buyer knew of this fact and acted upon it.

WILLS—PRESUMPTION OF UNDUE INFLUENCE ARISING FROM FIDUCIARY RELATION.—Testatrix made certain devises and bequests to the principal defendant, Dr. Dinwiddie, who was her trusted confidential adviser and practicing physician. The daughter of the testatrix contested the will on the sole ground that Dinwiddie had exercised undue influence over the testatrix. *Held,* that where a fiduciary or confidential relationship is shown to exist, the law presumes that the gift was the result of undue influence, and the burden is thrown on the recipient of the gift to show that it was not. *Burton* v. *Holman,* (Mo., 1921) 231 S. W. 630.

This case follows out the doctrine established in preceding Missouri decisions on the subject of undue influence. *Dausman* v. *Rankin,* 189 Mo. 677; *Grundmann* v. *Wilde,* 255 Mo. 109. But this view seems to be contrary to the great weight of authority in the United States. *Claussenius* v. *Claussenius,* 179 Ill. 545; *Convey* v. *Murphy,* 146 Ia. 154; *In re Smith's Will,* 72 N. Y. Sup. 1090; *Caughey* v. *Bridenbaugh,* 208 Pa. St. 414. The question of undue influence being presumed from a fiduciary or confidential relationship existing between the testator and the devisee or legatee under the will, has arisen frequently in our courts, and several recent cases have been decided contrary to the rule laid down in the principal case. In *McCune* v. *Reynolds,* 288 Ill. 188, the court said, "the burden rests upon the contestant to prove the charge of undue influence. This cannot be done by the establishment, alone, of a fiduciary relation between the testator and the beneficiaries * * * this does not put upon them the burden of showing an absence of fraud or undue influence." *In re Dale's Estate,* 92 Ore. 57, held that, while a confidential relation between the testator and the beneficiary was a circumstance to be taken into consideration, it did not in itself create a presumption that undue influence had been exerted. To the same effect are, *Brotherhood of R. R. Trainmen* v. *Van Etten,* 90 N. J. Eq. 612, and *Downey* v. *Guilfoile,* 93 Conn. 630. The *Downey* case is commented on in 29 YALE L. J. 133. That unnatural disposition of property does not show testamentary incapacity is held in *Whitman's Est.* (S. D. 1921) 184 N. W. 975.